No 387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNION DIME SAVINGS BANK,
Petitioner,

against

IRA ADAMS, CLIFFORD GREGORY, CECIL HUNT, JACK PIZZITOLA and LEONARDO RATCLIFFE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Table of Cases Cited.

Table of Statutes Cited.

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1. Opinions Below.

The opinion in the District Court is reported in 53 Fed. Supp. 782 and is printed at pages 386-390 of the record (1156-1170).* The opinion of the Circuit Court of Appeals dated July 18th, 1944 is reported in —— Fed. 2d. —— and is printed at pages 399-402 of the record.

2. Statement.

This was an action instituted by respondents to recover unpaid overtime wages pursuant to the provisions of the Fair Labor Standards Act of 1938 (Act of June 25th, 1938, C. 676, 52 Stat. 1060, 29 U. S. C. A. Sec. 201 *et seq.*) to-

*References are to folios in the record unless otherwise indicated.

gether with liquidated damages, attorneys' fees and costs. The action was commenced in the United States District Court for the Southern District of New York.

Respondents, during the period in suit, were employed as elevator operators, firemen and in similar occupations in loft buildings owned by the petitioner in the Borough of Manhattan, City and State of New York (Findings of Fact #1, 2, fol. 1138). They were employed pursuant to the terms of various union contracts (1140).

There were originally five plaintiffs but six additional plaintiffs were added pursuant to agreement at a pre-trial conference on February 19th, 1943 (3). In order to shorten and facilitate the trial a stipulation was entered into between the parties (Plaintiff's Exhibit #2, 1087-1098) pursuant to which the parties agreed that plaintiff "Ira Adams at all the times mentioned in the complaint was engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act" (1088). It was further stipulated and agreed that if the Court found in favor of plaintiff Ira Adams, that the other named plaintiffs would thereupon be entitled to recover against the defendant in accordance with certain specified amounts set forth in Schedule "A" attached to said stipulation (1096-1098) in addition to such liquidated damages, attorneys' fees and costs as the Court might award (1089). It was further stipulated that plaintiff Ira Adams received $23.00 per week for a 48 hour week from October 24th, 1938 to April 27th, 1939; $24.00 per week from April 28th, 1939 to October 24th, 1940 for a 47 hour week; and $25.00 per week for a 47 hour week from October 25th, 1940 to February 26th, 1942 (1091).

Thus the petitioner acknowledged that during the periods in question plaintiffs were covered by the Act and entitled to the benefits thereof. This concession was made by petitioner in view of the decision of this Court in *Kirschbaum Co.* v. *Walling* (combined with *Arsenal*

Building v. *Walling*), 316 U. S. 517. Petitioner interposed seven affirmative defenses and one counterclaim (30-62). By order dated February 13th, 1943 (89-93) all of the affirmative defenses with the exception of the second defense and counterclaim were stricken from the answer. The said second defense and counterclaim were dismissed after trial in the District Court (53 Fed. Supp. 782).

In a *per curiam* opinion the Circuit Court of Appeals for the Second Circuit affirmed.

In substance the defenses raised by the petitioner below in its pleadings (30-62) were as follows:

a. The petitioner claimed that although the respondents worked hours in excess of the statutory maximum, they had been paid in full (50-52) on the theory that the union contracts were reasonably capable of a construction consistent with the Fair Labor Standards Act. In said defense it was claimed that the parties had "impliedly agreed" that the regular hourly rate would be such a rate as would include payment for both straight time and overtime within the wages actually paid (51).

This proposition is stated in the petition herein in an erronious fashion at page 8, paragraph 13 (a). In said statement, it is assumed that a regular hourly rate can be reasonably implied from the agreements herein in a manner other than by application of the principle set forth by this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, wherein this Court stated (footnote page 580):

> "Wages divided by hours equal regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours".

b. Secondly, the petitioner sought to reform the Union Agreements in question (45-50) so as to insert in said

agreements a formula devised by its attorneys more than two (2) years after the date of the contract (840-844). This reformation was sought on the claim that there had been a mutual mistake of fact and law as to the applicability of the Fair Labor Standards Act at the time of the negotiation of the Union Agreements in question. This claim of mutual mistake was rejected on the facts both in the District Court (1149, 1153) and in the Circuit Court (page 402 of record) on the ground that defendants had not shown that such a mutual mistake either of law or of fact existed. The claim was rejected on questions of law as well.

c. Petitioner claimed that the conduct of respondents in accepting their pay without immediately demanding their overtime constituted an estoppel.

d. Petitioner further claimed that the imposition of liquidated damages and attorneys' fees constituted an unconstitutional application of the Fair Labor Standards Act.

3. Argument.

Summary of Argument.

A. On substantially all the questions raised this Court has ruled adversely to petitioner's contentions.

B. The opinions of the Circuit Courts and State Courts are uniformly opposed to petitioner's position on the questions raised herein.

C. No adequate reason is set forth in the petition herein for a review by this Court in this case.

POINT A.

On substantially all the questions raised this Court has ruled adversely to petitioner's contentions.

In connection with the defense of payment raised by the petitioners below (50-52) the petitioner argues that the regular hourly rate should be determined, not by dividing the wages by the hours as set forth in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, but by application of such a formula as would include time and a half for overtime hours within the wages actually paid (51). Their claim was that since the employees in question had been hired for a regular work week (even though in excess of the maximum hours set forth in the Act) at a regular wage, the parties had thereby "impliedly agreed" that overtime wages were included within the regular weekly wage.

The general proposition as to method of computation has been entirely settled by the decisions of this Court in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572 and *Warren-Bradshaw* v. *Hall,* 317 U. S. 88, 93. These decisions preclude the petitioner's method of computation.

The precise question was similarly determined in *Floyd* v. *DuBois Soap Co.,* 317 U. S. 596, where a contract for a definite weekly wage and work week was involved.

The second contention of defendants below, namely, that the contracts ought to be reformed on the ground that the parties would have inserted a formula whereby the overtime wages would have been included in the regular weekly wage, had they known of the applicability of the Fair Labor Standards Act, is of course, an attempt to accomplish by reformation that which cannot be accomplished by implication. This contention is invalid for the same reasons set forth *supra.* Furthermore in connection

with the counterclaim of petitioner below for reformation, it should be noted that both the District Court and the Circuit Court clearly and unequivocally rejected the petitioner's contention that there was a mutual mistake of either fact or law in connection with the negotiation of the Union Agreements in question (1149, 1153, page 402 of record). As stated by the Circuit Court in its opinion (page 402 of record):

> "Judge Burke said in his opinion that the evidence falls short of establishing clearly that the 'alleged mutual mistake resulted in a contract which failed to express the actual intent of the parties' and made a finding (#19) to that (fol. 403) effect. We cannot say that the contracts were made under mutual mistake merely because they violated the Act and might have been drawn in conformity with it and that they should, therefore, be recast in terms which, if originally adopted, would have been lawful. There was no proof that either party contemplated any such revised terms nor any reason to suppose that they would have been acceptable."

This is especially compelling in view of this Court's decision in *Philippine Sugar Estates Development Co., Ltd.* v. *Government of the Philippine Islands,* 247 U. S. 385, 391, wherein it was held that relief by way of reformation will not be granted unless the proof of mutual mistake be "of the clearest and most satisfactory character." See also:

Salomon v. *North British & Mercantile Ins. Co. of N. Y.*, 215 N. Y. 214, 217;
Porter v. *Commercial Casualty Co.*, 292 N. Y. 176, 181-2.

POINT B.

The opinions of the Circuit Courts and the State Courts are uniformly opposed to petitioner's position on the questions raised herein.

With regard to the defense of payment see:

Patsy Oil & Gas Co. v. *Roberts,* 132 Fed. (2d) 826, 827 (C. C. A., 10th);

Seneca Coal & Coke Co. v. *Lofton,* 136 Fed. (2d) 359, 362 (C. C. A. 10th); cert. denied 88 L. Ed. 43 (advance sheet);

Walling v. *Stone,* 131 Fed. (2d) 461, 462, 463 (C. C. A., 7th);

Garrity v. *Bagold Corp.,* 267 App. Div. 353, 46 N. Y. Supp. (2d) 637, (N. Y. App. Div. First Dept.);

Walsh v. *515 Madison Ave. Corp.,* 267 App. Div. 756, 45 N. Y. Supp. (2d) 927, (N. Y. App. Div. First Dept.), affirming 181 Misc. 219, 42 N. Y. Supp. (2d) 262.

The identical defense and counterclaim for reformation was decided adversely to petitioner's position in the following cases in addition to the case herein and its companion case of *Greenberg* v. *Arsenal* decided at the same time by the Circuit Court of Appeals for the Second Circuit.

Bailey v. *Karolyna,* 50 Fed. Supp. 142;

Garrity v. *Bagold Corp.,* 267 App. Div. 353, 46 N. Y. Supp. (2d) 637 (N. Y. App. Div. First Dept.);

Walsh v. *515 Madison Ave. Corp.,* 267 App. Div. 756, 45 N. Y. Supp. (2d) 927, (N. Y. App. Div. First Dept.), affirming 181 Misc. 219, 42 N. Y. Supp. (2d) 262.

The cases on the identical defense and counterclaim for reformation in the District Courts and the State Courts have been too numerous to mention and have been almost uniformly adverse to petitioner's position.

All the cases referred to *supra* which denied the identical defense and counterclaim for reformation, also rejected the defense of estoppel.

In connection with the general principles governing the degree of proof required and the nature of the proof required for reformation the following cases are in conflict with the position of petitioner herein.

Philippine Sugar Estates Development Co., Ltd. v. *Government of the Philippine Islands,* 247 U. S. 385;
Curtis v. *Albee,* 167 N. Y. 360;
Salomon v. *North British & Mercantile Ins. Co. of* N. Y., 215 N. Y. 214.

It has likewise been held with almost complete unanimity that liquidated damages and attorneys' fees should be assessed as a matter of law.

Rigopoulos v. *Kervan,* 140 Fed. (2d) 506 (C. C. A. 2nd);
Seneca Coal & Coke Co. v. *Lofton,* 136 Fed. (2d) 359, (C. C. A. 10th); cert. denied, 88 L. Ed. 43 (advance sheet);
O'Neill v. *Brooklyn Savings Bank,* — N. Y. — (affirming 267 App. Div. 317).

Not only did the petitioner fail to show any mutual mistake by the parties with regard to the applicability of the Fair Labor Standards Act at the time the union contracts were entered into, but an examination of the record will show that the overwhelming weight of the evidence

points to the opposite conclusion (332, 588, 778-779, 950-954, 960-964).

Likewise, the contention that the imposition of liquidated damages and counsel fees constitutes an unconstitutional application of the Act is without merit and has been so determined in the applicable decisions of this Court. In *U. S.* v. *Darby,* 312 U. S. 100, this Court upheld the constitutionality of the Act. In *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, this Court held that the liquidated damage provision of the Act was not a penalty.

POINT C.

No adequate reason is set forth in the petition herein for a review by this Court in this case.

In the light of the facts hereinbefore presented and in view of the provisions of Rule 38, Subdivision 5 of this Court, it becomes evident that no special and important reasons have been shown why this Court need pass on this case. It was admitted herein that the respondents worked for workweeks in excess of the maximum set forth in the Act. Using the method of computation repeatedly applied by this Court, respondents did not receive time and a half for their overtime. Their coverage was determined by this Court in *Kirschbaum Co.* v. *Walling* (combined with *Arsenal Bldg. Corp.* v. *Walling*), 316 U. S. 517. The petitioner has raised extremely technical defenses in an attempt to defeat recovery under a remedial statute. In both the District Court and the Circuit Court, petitioner's position has been rejected both on the facts and on the law, and on the questions involved there is substantial unanimity in all the courts of the land. There remains no important question of law in this case which has not been settled by this Court.

Conclusion.

It is therefore requested that the petition herein for a writ of certiorari be denied.

Respectfully submitted,

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